88-1583

SUPREME COURT, U.S.
FILED
MAR 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

FREDERICK P. SINGER, Administrator of the Estate of FREDERICK P. SINGER, JR., deceased and ROBBINS INVESTMENT CORPORATION,

Petitioners

versus

GENERAL MOTORS CORPORATION and BRONSBERG & HUGHES PONTIAC INC. and FREDERICK BALL, ROBBINS DOOR & SASH CO. and ROBBINS INVESTMENT CORP.,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Richard J. Orloski,
Counsel for Petitioner
ORLOSKI & HINGA
1005 S. Cedar Crest Blvd.
Allentown, PA 18103
(215) 433-2363

7 pp

QUESTION PRESENTED FOR REVIEW

I. WHETHER OR NOT THE TRIAL COURT ERRED AS A MATTER OF LAW IN RELYING UPON FEDERAL AUTHORITY TO EXCLUDE FROM EVIDENCE VARIOUS INVESTIGATORY REPORTS BY THE UNITED STATES DEPARTMENT OF TRANSPORTATION AS PREPARED BY THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATOR'S (NHTSA) OFFICE WHERE PLAINTIFF, ADMINISTRATOR OF THE ESTATE OF A DECEASED WHO WAS KILLED IN AN AUTOMOBILE CRASH ALLEGEDLY DUE TO DEFENDANT MANUFACTURER'S DEFECT, NEEDS THESE RELEVANT AND RELIABLE DOCUMENTS TO PROVE ITS CASE AGAINST DEFENDANT?

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NO.

FREDERICK P. SINGER, Administrator of the Estate of FREDERICK P. SINGER, JR. Deceased, and ROBBINS INVESTMENT CORP.,

Petitioners

versus

GENERAL MOTORS CORPORATION, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI

The Petitioners pray that a Writ of Certiorari issue to review the Order of the Supreme Court of the Commonwealth of Pennsylvania.

OPINIONS BELOW

The Order of the Supreme Court of the Commonwealth of Pennsylvania, Eastern District rendered December 30, 1988 is recorded and appears at page of the Appendix herein.

Judgment and Order and Opinion of the Superior Court of Commonwealth of Pennsylvania dated April 12, 1988 is unrecorded and appears at page 26 of the Appendix herein. Order dated May 15, 1985 and Opinion filed July 27, 1987 _____Leh Co. _____ (1987) and appear at page 42 of the Appendix herein.

JURISDICTION

The final judgment of the Supreme Court of the Commonwealth of Pennsylvania dated 12/30/88 and the Writ of Certiorari is timely filed within ninety (90) days thereof. The jurisdiction of this Court rests upon 20 U.S.C. Section 1254(1) and Rule 17 of this Honorable Court.

FEDERAL PROVISION INVOLVED

"Records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth: (A) the activities of the office or agency; or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report...; or (C) in civil actions and proceedings and against the Government in criminal cases, actual findings resulting from an investigation made pursuant to authority granted by law, unless the source of information or other circumstances indicate lack of trustworthiness." Federal Rules of Evidence 803(c); 28 U.S.C.A.

STATEMENT OF THE CASE

a) Procedural History

On or about September 1976, Plaintiff filed this action against Defendants seeking damages based upon the death of Plaintiff's Decedent due to injuries sustained while a passenger in an automobile manufactured by Defendant with a defective steering mechanism. After discovery, the parties tried this case before the Honorable Martin J. Coyne and a jury from August 14, 1979 until August 24, 1979.

Although the jury found that the steering mechanism of the vehicle in question was defective, it rendered a verdict in favor of Defendant.

Plaintiff filed a timely motion for a new trial which was originally assigned before President Judge Coyne of the Court of Common Pleas. Judge Coyne retired

without rendering a decision on Plaintiff's Motion. Accordingly, the Court of Common Pleas of Lehigh County ordered reargument.

After reargument, said Court entered an Order and Opinion dated May 15, 1985 denying Plaintiff's Motion For A New Trial. The Order and Opinion were filed on July 23, 1987 after which Plaintiff filed a timely appeal to the Superior Court of Pennsylvania. On April 12, 1988, the Superior Court entered judgment affirming the denial of Plaintiff's Motion For A New Trial. Plaintiff sought review of the Superior Court's decision. Plaintiff's Petition for Allowance of Appeal to the Supreme Court of the Commonwealth of Pennsylvania was denied on December 30, 1988. Plaintiff files this timely Petition For Writ of Certiorari which is now before this Honorable Court for disposition.

b) Statement of Facts

On Friday, August 1, 1985, Frederick

N. Ball, then 27 years of age, and the Plaintiff's decedent, Frederick P. Singer, Jr., then 25 years of age, who were childhood friends (n. 87),* had gone out together on the aforesaid date about 7:30 P.M. to visit a friend and the Allentown Fair. (n. 88,95). On the said date, Frederick M. Ball was operating a red 1975 Pontiac Catalina which was provided to him by his employer, Robbins Door & Sash Company. (n. 88). The said vehicle was purchased new by a affiliate corporation, Robbins Investment Corporation in January 1979 from Bronsberg & Hughes Pontiac (n.88). The said vehicle had 150 miles on the odometer when it was purchased, and approximately 13,000 miles at the time of the accident. (n.88,91). All of the aforesaid mileage was put on the car by Ball (n.91). Around 12,000 miles, the power

*All references to record refer to notes of testimony dated August 14 and 15, 1979.

steering started to leak oil which required him to add oil about once a week, (n.91,92), although the problem was never so great that the power steering was rendered inoperable (n.93). Ball never made any repairs or had the vehicle modified or disassembled in any way except for the addition of the said power steering fluid (n.94), the installation of air shocks (n.103) and a C.B. radio (n.104).

On Friday, August 1, 19765, Ball and Singer, with Ball driving, went to visit a mutual friend and then attended the Allentown Fair (n.95), and a place in Cetronia, Pennsylvania where they played a bowling machine (n.116). The accident which is the subject of the within action occurred after Ball and Singer left the bowling machine establishment and were on their way to breakfast (n.95). Ball's best recollection is that they left the bowling machine place about 2:15 A.M., the accident occurring at

a point approximately two miles east at the intersection of Broadway and 40th Streets in South Whitehall township, Pennsylvania (n.95, 116, 117). Ball was familiar with this stretch of road, having traveled it several times before (n.95,96). Prior to the accident, Ball was traveling eastwardly in a south lane of travel (right hand) and observed no other traffic on the road from the point he left the parking lot to the point of the accident. (n.96). Ball was traveling approximately 45 miles per hour, 50 at most (n. 98), as he approached the accident scene (n.97). As Ball approached the curve just west of the accident scene, he "tried turning and it just didn't respond" (n.97). His recollection was that "I felt like [it was] a normal turn into a road and it just felt like it wanted to go straight..." (n.99). As a result of the accident, he suffered head injuries (n.99).

The policeman investigating the

accident, Harry C. Bensinger, Jr. was a patrolman with the South Whitehall Police Department for five years at time of trial (n.31). He was on duty the night of the accident and received the call to proceed to the accident scene at 2:42 A.M. When he arrived at the accident scene, the Cetronia Ambulance Corps vehicle was already at the scene (n.32). He observed the 1975 Pontiac on its roof on a grassy area off the road (n.32). The officer described the roadway as being 20' in width and made of concrete (n.33). Broadway runs in east-west direction with shoulders on both sides composed of gravel and grass (n.34), and consists of two lanes (n.62). On the south side of the roadway in area of the curve, there was a guardrail made of wooden posts and heavy cable. (n.36). The guardrail posts were located 3 feet in from the improved surface with the posts being 9 feet apart (n.37). The first post of the guardrail (traveling

west to east), was down prior to the accident (n.37). The roadway into the first part of the turn (west to east) is a slight upgrade, and partway into the curve, t becomes a downgrade (n.38). Immediately adjacent to the guardrail post at 40th & Broadway, there was a firewood log pile approximately 3 feet high, the same height as the guardrail (n.40).

Some of the logs were scattered indicating that they had been struck during the course of the accident (n.41). There were nc tire marks on the improved part of the roadway, but there were tire marks described as "yaw" marks going across a private driveway located partway into the turn (n.46). [1]

---

[1] The police diagram of the accident erroneously indicated that there were skid marks on the roadway. The police officer explicitly stated, however, that there were no skid marks on the traveled portion of the roadway.

Evidence of the path of the Ball car was visible along the shoulder of the road "just prior to the curve, where the curve began in the roadway." (n.47). The Ball car was damaged "beginning from the right front fender and proceeding all the way back to the right rear fender and damage to the roof." (n.58). The damage to the right side of the vehicle in the officer's opinion was caused by the guardrail (n.58). The speed limit in the area at the time of the accident was 35 mph. (n.60).

Albert Fonda, who qualified as an expert at the trial testified that he removed the power steering unit from the Ball vehicle (n.34), and that the system had not been tampered with from the date of the accident. (n.340. In addition to describing the operation of the power steering system, Mr. Fonda produced photographs which he took during the disassembly of the power steering unit

which depicted the condition of the unit as he found it. He found contamination n the unit (n.49) and signs of wear (n.53).* When asked whether the Saginaw power steering unit had a design defect, Mr. Fonda stated "It has by design a defect in that it does not have a filter. I should say an effective filter, because I would require that there not only be a filter, but be an effective filter." (n.93,103).** Mr. Fonda also found evidence of leakage of the power steering system on the Ball car (n.93-96). Based on his experience and expertise, Mr. Fonda stated that the defect caused the accident which killed Plaintiff's decedent. (n.93-96).

Dr. Ernest C. Fitch, an international

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* Citations are to transcript of 8/17/79.

** Page references are to Notes of Testimony designated 8/20/79.

Dr. Fritch in answer to the question as to the level of contamination in the Ball vehicle, stated: "Sir, it exceeded every standard I've ever heard of...it is grossly contaminated." (n.49). In answer to the question: did the 1975 Pontiac contain a design defect with respect to the power steering system?, Dr. Fitch stated, "It does not have a filter. It's a design defect without any doubt in my mind.

The Complaint against General Motors contained three counts seeking compensatory and punitive damages: (1) negligence; (2) breach of implied warranty; and (3) strict liability under 402(a) of the Restatement of Torts alleging a design defect in the power steering unit.

The parties stipulated the damages as $200,000.00 and agreed to try the case on liability only. (n.4).* There was a further

*Refer to August 14 and 15, 1979 Transcript

agreement that no letters or documents would be referred to until the court ruled on their admissibility. (n.5).

Immediately prior to the trial, there was a recorded pretrial conference wherein Plaintiff offered the official documents from the U.S. Dept. of Transportation into evidence. See, Item I of List of Exhibits which incorporates Appendix A. The trial court ruled that the documents were wholly inadmissible. Other problems of trial rulings and jury instructions are not directly relevant to this Petition.

In addition to the verdict slip, interrogatories were submitted to the jury which retired to deliberate a verdict on August 24, 1979. The jury returned the same day with a verdict for the Plaintiff against the Additional Defendant, Frederick N. Ball, and for the Defendant, General Motors Corporation, against the Plaintiff. The jury specifically agreed that the

Saginaw power steering gear of the 1975 Pontiac Catalina was in a defective condition when it left the possession of Defendant, General Motors Corporation. Inter. No. and Answer No. 1.

Upon these facts, Plaintiffs respectfully petition this Honorable Court for a Writ of Certiorari.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Review by certiorari is appropriate in the case at bar under Rule 17(1)(b)(c) of the United States Supreme Court in that the Supreme Court of the Commonwealth of Pennsylvania has decided a Federal question in a way in conflict with the decision of this Honorable United States Supreme Court.

ARGUMENT

I. WHETHER OR NOT THE TRIAL COURT ERRED AS A MATTER OF LAW IN RELYING UPON FEDERAL AUTHORITY TO EXCLUDE FROM EVIDENCE VARIOUS INVESTIGATORY BY THE UNITED STATES DEPARTMENT OF TRANSPORTATION AS PREPARED BY THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATOR'S (NHTSA) OFFICE WHERE PLAINTIFF, ADMINISTRATOR OF THE ESTATE OF A DECEASED WHO WAS KILLED IN AN AUTOMOBILE CRASH ALLEGEDLY DUE TO DEFENDANT MANUFACTURER'S DEFECT, NEEDS THESE RELEVANT AND RELIABLE DOCUMENTS TO PROVE ITS CASE AGAINST DEFENDANT?

1. Investigatory reports made by the Federal Government are not inadmissible hearsay merely because they contain conclusions or opinions. Beech Aircraft Corp. v. Rainey, _____U.S. _____ 109 S.Ct. 439 (1988) In Beech Aircraft Corp., supra, the spouses of deceased Navy pilots brought action against aircraft manufacturer and service company. The trial excluded Plaintiffs' proffered evidence of public investigatory reports containing factual finding, conclusions and opinions. The District

Court entered judgment on a jury verdict in favor of the Defendants. Plaintiffs appealed. The Circuit Court reversed. On rehearing, the Court of Appeals again reversed and certiorari was granted. The United States Supreme Court held, in pertinent part, that public records and reports containing factual information are not inadmissible hearsay because they contain opinions or conclusions.

Federal Rule of Evidence 803 (8)(C) provides an exception to the hearsay rule for public investigatory reports containing "factual findings". Until the Beech opinion, the Court of Appeals disagreed on whether or not the public records exception extended to conclusions and opinions contained in public reports.

The Commonwealth of Pennsylvania has a rule of evidence which also provides a hearsay exception for public records. 28

P.S. Section 123 et seq. and 28 P.S. Section 141 et seq. The Commonwealth of Pennsylvania has held for years, in accord with the recent Beech decision, that a public report is no less admissible because it contains conclusions and/or opinions.

In Pekelis v. Transcontinental Western Air, Inc., 187 F.2d 122 (2d Cir, 1951), Judge Augustus Hand held that investigative reports compiled in accordance with a Federal statute requiring compilation of such material in airplane accidents were admissible into evidence. In reaching this result, the Court expressly relied upon the decision in Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467, 473 (3d Cir, 1950), which held that mine accident investigative reports conducted by the Federal Bureau of Mines were admissible into evidence:

"The report which the plaintiff offered had been prepared in obedience to the above statutory provisions. The making of such reports is, by command of Congress, part of the 'business' of the Bureau of Mines. The report was a record of an 'occurrence' or 'event' and it was required by act of Congress. The document therefore comes squarely within the language of the federal statute and we think that the District Court erred in excluding it.

The report is no less admissible because it contains conclusions of experts which are based upon hearsay evidence as well as upon observation. These circumstances, by virtue of express statutory provision go to weight rather than to admissibility. Moreover, this Court has several times held that hospital records are admissible under the statute, and certainly medical diagnosis is no less a matter of opinion based upon observation and perhaps hearsay than this report of the Bureau's investigation. Bartkowski v. Pittsburgh & Lake Erie R. Co., 3 Cir, 1949, 172 F.2d 1007; Norwood v. Great American Indemnity Co., 3 Cir, 1944, 146 F.2d 797; Pollack v. Metropolitan Life Insurance Company., 3 Cir 1943, 138 F.2d 123".

This rule was also adopted by the Pennsylvania Supreme Court in Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893, 903 (1975) where the court wrote

as follows:

> "...any letters from defendant to the FAA...are admissible as admissions...any certified copies of FAA records and documents such as airworthiness directives...are not inadmissible on the basis of hearsay...See, PLE, Evidence Section 191; Paxon v. Jarka, 314 Pa. 148, 171 Atl. 468 (1934)."

In the case at bar, Plaintiffs offered for admission into evidence investigatory reports prepared by the National Highway Traffic Safety Administration (NHTSA) office for the United States Department of Transportation. The NHTSA reports contained information and results from the Federal government's investigation into the allegedly defective condition of the Saginaw Power Steering unit, the exact unit that Plaintiffs allege caused decedent's death.

Despite the aforesaid, Pennsylvania law which held that the reports are not inadmissible because they contain opinions

and conclusions, the trial court excluded the reports because they contained hearsay, i.e., opinions and conclusions. The trial court relied upon federal authority in excluding the Federal reports. The trial court relied upon Uitts v. General Motors Corporation, 411 F.Supp 1380 (E.D., 1974), aff'd, 513 F.2d 626 (3d Cir, 1975. The lower court in this case construed the Uitts decision to hold that public records containing conclusions and opinions must be excluded from evidence as "double hearsay". On that basis, the lower courts held that the NHTSA reports were inadmissible hearsay.

The Beech decision overturns all Federal authority holding that public records containing conclusions and opinions are automatically excludable from evidence. Thus the trial court's ruling excluding the

Petitioner's offer of NHTSA reports on the basis of untenable Federal authority must be reversed. The appellate court's failure to reverse this erroneous conclusion from evidence is unsupportable in light of the Beech decision. Petitioners respectfully seek certiorari.

2. The excluded public investigatory reports are relevant and necessary to Plaintiff's case against Defendant, General Motors. The trial court reasoned that even if the public reports were not inadmissible hearsay, the reports were irrelevant and thus excludable. The public reports involve extensive investigation and factual findings by the NHTSA's office relative to the alleged defects in the Saginaw Power Steering Unit. The Saginaw Power Steering Unit is the exact unit contained inside the

vehicle which Plaintiffs allege was defective, proximately causing Decedent's death.

The fact that the NHTSA reports concerned some vehicles other than 1975 Pontiac Catalinas does not make the reports irrelevant. Plaintiffs alleged from the beginning that the Saginaw Power Steering Unit was defective resulting in Plaintiff's losses. The NHTSA reports deal precisely with Plaintiffs' allegations, i.e., defects in the particular steering unit. Thus, the reports are relevant to Plaintiffs' case against Defendant, General Motors.

The jury failed to find that a defect in the Saginaw Power Steering Unit caused Plaintiff's losses. Thus, the exclusion from evidence of Federal reports concerning defects in the unit was not harmless. Plaintiffs/Petitioners respectfully seek certiorari.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of the Commonwealth of Pennsylvania upholding the denial of Plaintiff/Petitioner's Motion for New Trial ought to be reversed.

Richard J. Orloski,
Attorney for Petitioner

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

January 4, 1989

Richard J. Orloski, Esquire
ORLOSKI & HINGA
1005 S. Cedar Crest Boulevard
Allentown, PA 1810

Re: Frderick P. Singer, et al. v.
General Motors, et al.
NO. 454 E.D. Allocatur Docket 1988

Dear Mr. Orloski:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above-captioned matter:

December 30, 1988.

Petition Denied.

Per Curiam.

Very truly yours,

PATRICK TASSOS
Deputy Prothonotary

/ma
cc: George J. Lavin, Jr., Esquire
Howard Epstein, Esquire

IN THE SUPERIOR COURT OF PENNSYLVANIA

FREDERICK P. SINGER, ADMINISTRATOR OF THE ESTATE OF FREDERICK P. SINGER, JR., DECEASED AND ROBBINS INVESTMENT CORP.
Appellants

vs.

GENERAL MOTORS CORP. & BRONSBERG & HUGHES PONTIAC, INC. and FREDERICK BALL, ROBBINS DOOR & SASH CO. and ROBBINS INVESTMENT CORP.
Appellees

No. 2405 Philadelphia 1987

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Lehigh County be, and the same is hereby AFFIRMED.

BY THE COURT:

Prothonotary

Dated: April 12, 1988

IN THE SUPERIOR COURT OF PENNSYLVANIA

FREDERICK P. SINGER, ADMINISTRATOR OF THE ESTATE OF FREDERICK P. SINGER, JR., DECEASED AND ROBBINS INVESTMENT CORP.
Appellants

vs.

GENERAL MOTORS CORP. & BRONSBERG & HUGHES PONTIAC, INC. and FREDERICK BALL, ROBBINS DOOR & SASH CO. and ROBBINS INVESTMENT CORP.
Appellees

No. 2405 Philadelphia 1987

Appeal from the Order entered August 6, 1987 in the Court of Common Pleas of Lehigh County, Civil Division, No. 121 September Term 1976.

BEFORE: BECK, KELLY and JOHNSON, JJ.

MEMORANDUM: FILED APRIL 12, 1988

Appellant, Frederick P. Singer, executor of the estate of his deceased son, Frederick P. Singer, Jr., raises this appeal from that portion of the jury verdict entered in favor of appellee, General Motors Corporation (hereinafter "GM") and against appellant. We affirm

judgment entered in favor of GM and deny appellant's request for a new trial.

The opinion of the court en banc empanelled to hear the post-trial motions [post-trial court] ably sets forth the facts and procedure of this matter. Accordingly, we reproduce that portion of the opinion.

> The plaintiffs, Frederick P. Singer, Administrator of the Estate of Frederick P. Singer, Jr., deceased, and Robbins Investment Corporation, instituted this action to recover damages resulting from a motor vehicle accident. Originally named as defendants were General Motors Corporation (hereinafter referred to as GM) and Bronsberg & Hughes Pontiac, Inc. Frederick Ball was joined as an additional defendant along with Robbins Door & sash Co. and Robbins Investment Corporation, Ball's employer and the vehicle owner respectively. Subsequently, Bronsberg & Hughes and the two Robbins additional defendants were dismissed from the action. Robbins Investment Corporation was also dropped as a party plaintiff at a later date.
>
> The case was tried before the Honorable Martin J. Coyne and a jury from August 14, 1979 to August 24, 1979. At the conclusion of the trial, the jury found in response to special

interrogatories that the death of Mr. Singer was proximately caused by the negligence of Frederick Ball, the person who had been driving the vehicle. While the jury had found that the power steering mechanism of the vehicle was defective, it did not find that this defect was a substantial factor in the death of Mr. Singer.

The plaintiff, Frederick P. Singer, has moved for a new trial on the basis of certain rulings by the trial court. Having reviewed these rulings, we find that the trial court had not committed errors by its rulings, or, if it had, that such errors were harmless to the plaintiff. Accordingly, the plaintiffs' motion for new trial must be denied. [1]

This action arises out of a one vehicle collision which occurred on August 2, 1975. The vehicle involved was a 1975 Pontiac Catalina manufactured by GM and driven by the additional Frederick Ball. A passenger in the vehicle, Frederick P. Singer, Jr., died as a result of injuries he received in the accident.

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[1] The plaintiffs' motion for new trial was originally argued before President Judge Coyne. Judge Coyne subsequently retired before rendering a decision. Because of this fact, reargument was ordered by the court to properly review the matter.

Mr. Ball and Mr. Singer had been out together on the night proceeding [sic] the accident. At approximately 2:40 A.M. while driving away from an establishment where the two had been bowling, the vehicle failed to negotiate a curve and left the roadway. The physical evidence, as described at trial by the investigating police officer, showed that the vehicle traveled an additional 241 feet from the roadway, taking down guardrail posts and speed limit signs and scattering a pile of logs, before coming to rest on its roof. Ball could not recall if he had applied the brakes, and skid marks from breaking [sic] were not observed on the roadway. The car had been traveling the road at 40 to 50 miles per hour. The posted speed limit for the area was 35 miles per hour.

The plaintiffs' cause of action against GM was based on an alleged defective design of the vehicle's power steering system. Ball testified that, as he entered the curve in the roadway, the vehicle "just felt like it wanted to go straight. " N.T., 8/14/78, p. 99. Prior to the incident, however, Ball had never experienced difficulty with the steering mechanism. Further, Ball had not mentioned the steering difficulty to the investigating police officer. At trial, the plaintiff produced three expert witnesses who opined that the

collision was caused by a lock-up of the power steering gear.

(Post-Trial Ct. Op. at 2-4).

Appellant alleged numerous assignments of error in his post-trial motions, and raised nine of those assignments on appeal. The first four assignments allege error in the jury instructions, the latter five concern evidentiary rulings made during trial. We shall discuss several of the assignments. However, as the court's opinion thoroughly and accurately disposes of appellant's issues 2,4, and 5-9, we rely and incorporate that portion of the opinion.

I. JURY CHARGE

Initially, we note our standard of review of allegations of error in the jury instructions:

> A jury charge has wide latitude in charging the jury and may use any particular language provided the language used adequately and fully conveys the laws applicable to the facts of the case.

'A jury "charge should be clear and precise and so couched as to not confuse the jury." However, "contradictory instructions are not always reversible error. An erroneous statement of law in one portion of the charge can be rendered harmless by a subsequent correct statement of the same principles if the jury is clearly instructed that the latter statement...is the correct statement.'...'Whether the jury should be instructed on a given point of law, of course, depends upon the facts and the issues in the case. It is axiomatic that where there is a dispute as to what the relevant facts are, this dispute must be submitted to the jury along with instructions on points of law which, with a view to the evidence in the case, are relevant.' 'In reviewing a trial judge's charge, the proper test is not whether certain portions taken out of context appear erroneous. We look to the charge in its entirety, against the background of the evidence in the particular case, to determine whether or not error was committed and whether that error was prejudicial to the complaining party.'

Beary v. Container General Corp., ___ Pa. Super ___, 533 A.2d 716 (1987) (citations omitted).

A.

Appellant's first allegation of error is the trial court's refusal to use appel-

lant's suggested charge on contributory negligence; appellant wanted a charge that the negligence of the additional defendant [Ball] was not a defense available to GM under the strict liability theory of the case but rather could only operate as a ground for finding Ball additionally liable with GM. Appellant cited McCown v. International Harvester Co., 463 Pa. 13, 342 A.2d 381 (1975) in support of this charge.

To begin, we note that appellant misconstrues McCown. In McCown, our Supreme Court ruled that Pennsylvania, in adopting the Restatement of Torts, Second Section 402A on product liability, was also adopting the Restatement position that contributory negligence of the user of the product was not a defense to the strict liability imposed upon the manufacturer of a defective product. Justice Pomeroy in concurrence, added the caveat that negligence on the part of the user may be

relevant, not as a defense but rather:

> [S]uch evidence may bear directly upon the determination of whether the plaintiff has proved all the elements necessary to make out a cause of action. Thus, negligence in the use of a product may tend to show that the plaintiff caused a defect and therefore that the product was not defective when sold. See comment g to Section 402A. Again, if the negligent use of a product amounts to abnormal use, it may be inferred that the product was not defective at all, for a product is not defective if it is safe for normal handling and use. See Comment h to Section 402A. Similarly, negligence in the use of a product may have a bearing on the question whether a defect in a product was the legal cause of the plaintiff's injury. See Restatement (Second) of Torts Sections 5 and 9 and the Comments to these sections.
>
> What has been said is not intended as an exhaustive listing of the purposes for which the evidence of the plaintiff's negligence may be relevant in Section 402A cases. It is intended merely to indicate that, although such negligence is not per se as a bar to recovery, it may nevertheless have that effect in a proper case where it negates an essential element of the cause of action.

McCown, supra, at 384. (Footnote omitted).

GM attempted to prove, in its joinder of Ball, that the sole cause of the acci-

dent was Ball's negligence in operating the automobile rather than any defect in the automobile. As causation was in dispute, the judge was required to instruct the jury that they should determine the cause of the accident, whether it be the defect in the car's steering mechanism, the driver's negligence, both of the proffered causes, or neither. This the court did. (See N.T. 8/24/79 at 164-165). Appellant's charge incorrectly would have removed from jury consideration the issue of whether Ball's negligence was the sole cause of the accident. As such, it was properly refused. Nor did the court improperly charge or even suggest that only one legal cause of the accident could be found by the jury as appellant suggests. The court explicitly stated that both GM and Ball could be liable, and presented the jury with a verdict slip stating this alternative. (See N.T. 8/24/79 at 164-165, 169-171).

Appellant also argues the court failed to define the "substantial factor" test of causation, and failed to state explicitly that there might be more than one "substantial factor." Appellant further notes the special interrogatories used the undefined term substantial factor, and thus confused the jury.

Any error resulting from failure to define the term substantial factor was at most de minimis or harmless as the jury is capable of understanding self-explanatory terms without instructions. See, City of Philadelphia v. Shapiro, 416 Pa. 308, 206 A.2d 308 (1965); Dixon v. Andrew Tile Manufacturing Corp., 238 Pa.Super. 275, 357 A.2d 667 (1976). We note in support that the jury did not question the term, although it did question the term "defect" as used in the special interrogatories. (N.T. at 178). cf. McKay v. Sandmold Systems, Inc., 333 Pa.Super. 235, 482 A.2d

260 (1984) (error in failure to define concept of "defectiveness"). Furthermore, as stated previously, the fact that there can be more than one "substantial factor" was made clear by the verdict slips, if not by the instructions.

We agree with the analysis of the post-trial court that there was no error or confusion in the special interrogatories.

> We are also unconvinced that the special interrogatories presented to the jury forced the jury into choosing that either G.M. or Ball alone was liable to the plaintiff, as alleged by the plaintiff. The interrogatories are not so written, and the judge's jury charge and the verdict slips for all possible results sent out with the jury lead to the opposite conclusion. Further, we note that a jury charge must be considered in its entirety, and that isolated portions of the charge, even if erroneous, will not justify a new trial unless they constitute basic fundamental and prejudicial error. Segriff v. Johnston, 402 Pa. 109, 166 A.2d 496 (1960), cert denied, 366 U.S. 941 (1961). The sum of the jury charge was correct as to this issue, and no specific instances of fundamental and prejudicial error are present.

(Post Trial Ct. Op, fn. 2,

B.

Appellant's third contention is that the trial court erred as its instructions generally tended to mislead the jury as to the proper law of products liability; such tendency would have been corrected by the use of appellant's proposed points for charge. Specifically, appellant directs this court's attention to the trial court's omissions in informing the jury: that GM need not have prior knowledge of the defect to be found liable; that a specific defect need not be proven for liability to exist; and that in order for additional defendant Ball's negligence to bar recovery from GM, the negligence must be an "intervening superseding cause" of the accident.

As to appellant's first point, we rely on the post-trial court opinion:

> The plaintiff's third allegation of error concerns the trial judge's exclusion of certain requested points for charge pertaining to a plaintiff's burden of proof under Section 402A of Restatement (Second)

> of Torts. It is quite apparent, however, that the substance of the plaintiff's points for charge was covered by the judge's instructions to the jury which, with accuracy and particularity, set forth the burden which a plaintiff must meet in order to prevail in a products liability action. See N.T., 8/24/79, pp 149-151. The refusal of a court to give a particular instruction as requested by counsel is not grounds for a new trial where the subject matter is adequately covered by another instruction or the charge as a whole. See Sapsara v. Peoples Cab Company, 2 D&C.2d 22 (1954), affi'd, 381 Pa. 241, 113 A.2d 278 (1955).
>
> (Trial Ct. Op. at 8-9).

Appellant's second point is equally meritless, as the jury found a specific defect in the car did exist; therefore, failure to give the requested charge did not prejudice appellant. Anderson v. Hughes, 417 Pa. 87, 208 A.2d 789 (1965). Finally, appellant's argument regarding an instruction on "intervening superseding causes" was not requested prior to the jury charge, nor raised in post-trial motions. Accordingly, it has been waived. Commonwealth ex rel. Robinson by Robinson

v. Robinson, 505 Pa. 226, 478 A.2d 800 (1984). Moreover, such a charge is specifically disapproved as being too confusing to the jury. See Pa. Standard Civil Jury Instructions Section 3.28, and comment.

II. EVIDENTIARY RULINGS

Appellant contends the trial court erred in excluding documentary evidence proffered by appellant; appellant argued the records were admissible as business records under a statutory exception to the hearsay rule, as proof of similar accidents, or as the admission of a party opponent. The post-trial court opinion adequately disposes of the first two contentions. We merely add to its analysis regarding appellant's contention that the trial court erred in refusing appellant permission to read into evidence certain admissions made by GM in response to interrogatories. Appellant fails to direct

our attention to that place in the record where the evidence was excluded and fails to present any argument on the subject in its appellate brief. (See Brief at 36-43)* Accordingly, we deem that contention waived. See Sheppard v. Old Heritage Mut. Ins. Co., 492 Pa. 581, 425 A.2d 304 (1980).

CONCLUSION

Finding no merit to appellant's contentions, we affirm the order of judgment. We rely on and incorporate the post-trial court opinion to dispose of appellant's remaining contentions.

JOHNSON, J. concurs in the result.

*The interrogatories apparently dealt with evidence of similar accidents involving similar model and year cars as the 1975 Pontiac Catalina. We note that the admission of evidence of similar accidents is a decision vested in the sound discretion of the trial judge. Whitman v. Riddell, 324 Pa.Super. 177, 471 A.2d 521 (1984).

COURT OF COMMON PLEAS OF LEHIGH COUNTY
CIVIL ACTION -LAW

FREDERICK P. SINGER, Administrator of the Estate of FREDERICK P. SINGER, JR., Deceased and ROBBINS INVESTMENT CORPORATION,
Plaintiffs

v.

GENERAL MOTORS CORPORATION and BRONSBERG & HUGHES PONTIAC, INC.,
Defendants

and

FREDERICK BALL, ROBBINS DOOR & SASH CO. and ROBBINS INVESTMENT CORPORATION,
Additional Defendants

NO. 121 September Term, 1976

* * *

ORDER

NOW, this 15th day of May 1985, for the reasons stated in the accompanying opinion, the motion of the plaintiff, Frederick P. Singer, for a new trial is hereby DENIED.

BY THE COURT:

_____
JOHN E. BACKENSTOE, P.J.

_____
MAXWELL E. DAVISON, J.

_____
JAMES KNOLL GARDNER, J.

COURT OF COMMON PLEAS OF LEHIGH COUNTY
CIVIL ACTION -LAW

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Plaintiffs

v.

GENERAL MOTORS CORPORATION and BRONSBERG & HUGHES PONTIAC, INC.,
Defendants

and

FREDERICK BALL, ROBBINS DOOR & SASH CO. and ROBBINS INVESTMENT CORPORATION,
Additional Defendants

NO. 121 September Term, 1976

APPEARANCES:

RICHARD J. ORLOSKI, ESQUIRE, with him
CALNAN & ORLOSKI, P.C.,
On behalf of the Plaintiff
Frederick P. Singer

THOMAS J. FINARELLI, ESQUIRE, with him
LIEBERT, SHORT, FITZPATRICK & LAVIN
On behalf of Defendant,
General Motors Corporation

OPINION OF THE COURT EN BANC

JOHN E. BACKENSTOE, P.J.

The Plaintiffs, Frederick P.Singer, Administrator of the Estate of Frederick P. Singer, Jr., deceased, and Robbins Investment Corporation, instituted this action to recover damages resulting from a motor vehicle accident. Originally named as defendants were General Motors Corporation (hereinafter referred to as GM) and Bronsberg & Hughes Pontiac, Inc. Frederick Ball was joined as an additional defendant along with Robbins Door & Sash Co. and Robbins Investment Corporation was also dropped as a party plaintiff at a later date.

The case was tried before the Honorable Martin J. Coyne and a jury from August 14, 1979 to August 24, 1979. At the conclusion of the trial, the jury found in response to special interrogatories that the death of Mr. Singer was proximately

caused by the negligence of Frederick Ball, the person who had been driving the vehicle. While the jury had found that the power steering mechanism of the vehicle was defective, it did not find that this defect was a substantial factor in the death of Mr. Singer.

The Plaintiff, Frederick P. Singer, has moved for a new trial on the basis of certain rulings by the trial court.

Having reviewed these rulings, we find that the trial court had not committed errors by its rulings, or, if it had, that such errors were harmless to the plaintiff. Accordingly, the plaintiff's motion for a new trial must be denied.

---

[1] The Plaintiff's motion for new trial was originally argued before President Judge Coyne. Judge Coyne subsequently retired before rendering a decision. Because of this fact, reargument was ordered by the court to properly review the matter.

This action arises out of a one vehicle collision which occurred on August 2, 1975. The vehicle involved was a 1975 Pontiac Catalina manufactured by GM and driven by the additional defendant, Frederick Ball. A passenger in the vehicle, Frederick P. Singer, Jr., died as a result of injuries he received in the accident.

Mr. Ball and Mr. Singer had been out together on the night proceeding the accident. At approximately 2:40 A.M., while driving away from an establishment where the two had been bowling, the vehicle failed to negotiate a curve and left the roadway. The physical evidence, as described at trial by the investigating police officer, showed that the vehicle traveled an additional 241 feet from the roadway, taking down guardrail posts and speed limit signs and scattering a pile of logs, before coming to rest on its roof.

Ball could not recall if he had applied the brakes, and skid marks from breaking were not observed on the roadway. The car had been traveling along the road at 40 to 50 miles per hour. The posted speed limit for the area was 35 miles per hour.

The plaintiffs' cause of action against GM was based on an alleged defective design of the vehicle's power steering system. Ball testified that, as he entered the curve in the roadway, the vehicle "just felt like it wanted to go straight." N.T. 8/14/79 p. 99. Prior to the incident, however, ball had never experienced difficulty with the steering mechanism. Further, Ball had not mentioned the steering difficulty to the investigating police officer. At trial, the plaintiff produced three expert witnesses who opined that the collision was caused by a lock-up of the power steering gear.

The plaintiffs raise nine assignments

of error in support of his motion for a new trial. The first four of these complaints deal with portions of the trial judge's charge to the jury; the later five deal with certain rules on evidence made by the trial judge.

I. THE JURY CHARGE

The plaintiff's first complaint of error is that the trial judge committed prejudicial error by refusing to include in his jury charge the plaintiff's request no. 22, which stated:

> 22. You are instructed that the manufacturer of an automobile with defective power steering is liable for injuries sustained in an accident resulting from such defective power steering even though the driver may have been negligent in his operation of the motor vehicle on a public highway. The negligence, if any, of the Additional Defendant, Frederick Ball, is not a defense to Plaintiff's claim that the Defendant, General Motors Corporation, is liable under the theories previously explained to you. If, however, you find that General Motors Corporation is liable for the sale of the 1975 Pontiac Catalina to Robbins Investment Corporation, and further find that

> the Additional defendant was negligent in the operation of the automobile which negligence proximately caused the fatal injuries to Plaintiff's decedent, you should find for the Plaintiff against both Defendants. McGown v. International Harvester, Co., 463 Pa, 13, 343 A.2d ___ (1975).

The Plaintiff further contends that the trial judge in his jury charge implied that if Ball was found to be negligent, there could be no recovery against G.M. We find the plaintiff's arguments to be meritless.

In his jury charge, the trial judge clearly delineated the plaintiff's case against G.M. and G.M.'s claim against the additional defendant. See, N.T. 8/24/79, pp. 149-164. In so doing, the judge charged the jury with the following.

> Now...in order for the plaintiff to recover from the defendant General Motors, it is incumbent upon the plaintiff to prove by a fair preponderance of the evidence, first, that there was a defect in the Ball car when it left the General Motors possession, and secondly, that the defect was a substantial factor in causing the accident which is the subject of this litigation.

> Next, in order for General Motors to succeed in its contention that Ball is liable to the plaintiff for these injuries, or that Ball is liable along with the defendant, therefore, it is necessary for defendant, General Motors to prove by a fair preponderance of the evidence that Ball was guilty of negligently operating his 1975 Pontiac, that is, Ball did not operate that car in the same manner that a reasonably careful person would have operated it, and that that failure was a substantial factor in bringing about plaintiff's injury...

N.T. 8/24/79 pp. 164-165 (emphasis supplied)

These instructions are quite correct, and they fully and adequately instruct the jury on the pertinent law. Far from implying that if the jury found that Ball was negligent it must absolve G.M. of any liability, the instructions indicate that the jury may find either that G.M. is alone liable to the plaintiff, that Ball is alone liable to the plaintiff, or that both G.M. and Ball are together liable to the Plaintiff. Further, the jury was furnished with individual verdict slips for each of the

above possible findings (including a fourth verdict slip for the findings that neither G.M. nor Ball was liable to the Plaintiff). N.T., 8/24/79, pp. 169-171. It is apparent, therefore, that the plaintiff's arguments--that the trial judge erred by implying to the jury that Ball's negligence, if found to be a substantial factor in causing the plaintiff's injuries,

would preclude a recovery against G.M., and that the trial judge erred by refusing to instruct the jury that Ball's contributory negligence if any, would not be a defense available to G.M. in the product's liability suit against G.M.--are without foundation.[2]

---

[2] We are also unconvinced that the special interrogatories presented to the jury forced the jury into choosing that either G.M. or Ball alone was liable to the plaintiff, as alleged by the plaintiff. The interrogatories are not so written, and the judge's jury charge and the verdict slips for all possible results sent out

The Plaintiff's second complaint of error concerns the trial judge's failure to instruct on the plaintiff's points for charge nos. 6 and 18.

The essence of the plaintiff's point for charge no. 6 is that the law makes no distinction between direct and circumstantial evidence. It is the plaintiff's position that a charge on circumstantial evidence is mandatory on request. Although there is authority to indicate that a charge of this nature is mandatory when requested for a criminal prosecution, Commonwealth v. Myers, 131 Pa.

CONTINUATION OF FOOTNOTE 2

with the jury lead to the opposite conclusion. Further, we note that a jury charge must be considered in its entirety, and that isolated portions of the charge, even if erroneous, will not justify a new trial unless they constitute basic fundamental and prejudicial error. Segriff v. Johnston, 402 Pa. 109, 166 A.2d 496 (1960), cert. denied, 366 U.S. 941 (1961). The sum of the jury charge was correct as to this issue, and no specific instances of fundamental and prejudicial error are present.

Super. 258, 200 A. 142 (1938), such authority does not exist in the case of civil trials.

In the present situation, although the trial judge did not specifically instruct that the law does not distinguish between direct and circumstantial evidence, his instructions to the jury when considered in their entirety accomplished the same end. The jurors were instructed to consider all of the credible evidence. N.T. 8/24/79, pp. 141, 142, 148. The very failure of the judge to distinguish between direct and circumstantial evidence implied that each should be accorded similar treatment in the jury's deliberation. The plaintiff, therefore, was not prejudiced by the failure of the trial judge to instruct on the plaintiff's point for charge no. 6.

The plaintiff also argues that a new trial should be awarded based on the trial judge's failure to charge in accordance

with the plaintiff's requested point no. 18 which states that in a products liability action the plaintiff need not present direct evidence of a specific defect, that evidence of a general malfunction would be sufficient. We need not. however, address the issue as to whether the judge's refusal to so instruct was error. The jury returned with a finding in the plaintiff's favor that there did indeed exist a defective condition in the power steering mechanism of the automobile, thus depriving the defendant's argument of any significance it might have had. If there was any error by the court, it was harmless and thus not reversible. See Anderson v. Hughes, 417 Pa. 87, 208 A.2d 789 (1965).

The plaintiff's third allegation of error concerns the trial judge's exclusion of certain requested points for charge pertaining to a plaintiff's burden of proof under Section 402A of the Restatement

(Second) of torts. It is quite apparent, however, that the substance of the plaintiff's points for charge was covered by the judge's instructions to the jury which, with accuracy and particularity, set forth the burden which a plaintiff must meet in order to prevail in a products liability action. See, N.T. 8/24/79, pp. 149-151. The refusal of a court to give a particular instruction as requested by counsel is not grounds for a new trial where the subject matter is adequately covered by another instruction or the charge as a whole. See Sapsara v. Peoples Cab Company, 2 D&C2d 22 (1954), aff'd, 381 Pa. 241, 113 A.2d 278 (1955).

In conjunction with this particular assignment of error, the plaintiff also takes issue with the following portion of the trial judge's charge:

> ...if you find that the Ball car was, in fact, traveling at an excessive rate of speed at the time of the accident and that that speed was a

> factor in the accident, then you should give no weight to either the opinion of Mr. Fonda or Dr. Fitch [the plaintiff's experts on the matter of the defective power steering mechanism]. In fact, if you so find, then your verdict should be in favor of the defendant, General Motors Corporation, and against the plaintiff, since the plaintiff's case against the defendant is dependent upon the opinions of Fonda and Fitch.
>
> N.T., 8/24/79 p. 154.

The plaintiff again argues that this charge had the effect of coercing the jury into deciding against the plaintiff and in favor of the defendant, G.M., if it found that the additional defendant, Ball, was speeding. This argument, however, demonstrates that the plaintiff has misconstrued the judge's statements.

The first sentence of the judge's charge refers to the weight to be given two expert opinions which were presented to address the issue of the cause of the accident in question. Both of the opinions were based on identical hypothetical questions in which the experts were specif-

ically requested by the plaintiff's counsel to assume that excessive speed was not a factor in the accident involving the Ball vehicle.

Opinion testimony of an expert should not be accepted by the jury unless the jury finds that all of the factual assumptions on which the testimony was based are correct. See Haberle v. Peterson, 262 Pa.Super. 247, 396 A.2d 738 (1978). Quite correctly, the trial judge indicated that in the absence of a material fact in a given hypothetical--in this case that the car was not traveling at an excessive rate of speed--the validity of the expert's opinion is removed.

In regard to the second sentence of the challenged portion of the judge's charge, it is apparent that the judge was expressing the reality that without the testimony of the two experts regarding the causation of the accident, the plaintiff's

action against G.M. must fail as there was virtually no other evidence establishing that the accident was in actuality caused by a defect in the steering mechanism.

The plaintiff next argues that the trial judge erred by failing to charge the jury on implied warranty of fitness as requested by the plaintiff in his points for charge nos. 20 and 21. It appears, however, that the action in implied warranty of fitness against G.M. had been withdrawn during pretrial proceedings. See N.T. 8/16/79, pp. 85-86. Based upon that circumstance, the plaintiff's argument is meritless.

In any event, the inclusion of such a charge would not have contributed to a different outcome of the case. The elements which a plaintiff must prove in an action under breach of implied warranty of fitness and section 402A are essentially the same. Se MacDougall v. Ford Motor Co.,

214 Pa.Super. 384, 257 A.2d 676 (1969). In this case, the plaintiff proved that a defective condition existed in the power steering mechanism, but he did not prove that this defect was a substantial factor in causing the plaintiff's damages. A jury charge on implied warranty of fitness could not have altered that result and led to a finding of liability on the part of G.M.

II. EVIDENTIARY RULINGS

The plaintiff next argues that the trial judge erred by excluding from evidence (1) certain investigative reports of the United States Department of Transportation as prepared by the National Highway Traffic Safety Administrator's Office of Defects Investigation (hereinafter referred to as NHTSA reports) and (2) various internal memoranda prepared by General Motors relating to the contamination sensitivity of the Saginaw power steering system, that system built into the

Ball vehicle. We find that both sets of documents were properly ruled inadmissible by the court.

The first set of documents consisted of 1,004 exhibits relating to various investigations performed by the NHTSA on the Saginaw power steering units in 1967-73 General Motors vehicles. The exclusion of the NHTSA reports was proper for two reasons.

First, the entire volume of the NHTSA reports offered by the plaintiff was replete with hearsay. The plaintiff did not attempt to delete or excise the hearsay portions of the reports, but argued only that all 1,004 documents in their entirety were admissible as business records.

The Uniform Business Records as Evidence Act, 42 Pa. C.S. Section 6108, provides generally that records made in the regular course of business are admissible as evidence. The Act does not, however,

make all business records competent as evidence; rather the Act demands that certain requirements be met if the records are to be admitted as evidence. Ceja v. Commonwealth Unemployment Compensation Board of Review, 41 Pa.Cmwlth. 487, 399 A.2d 807 (17979), aff'd, 493 Pa. 588, 427 A.2d 631 (1981); Haas v. Kasnot, 371 Pa. 580, 92 A.2d 171 (1952). If the material within the records is otherwise violative of the rules of evidence, the Act does not make these matters competent solely because they are contained within business records. Broadbent v. A. Moe & Co., 208 Pa.Super. 28, 220 A.2d 340 (1966).

The NHTSA records offered by the plaintiff contain numerous statements by individuals not employed by the NHTSA. These statements are in themselves hearsay. As such, the reliability of the documents containing this "double hearsay" is placed in doubt, and it was incumbent upon the

plaintiff to demonstrate the reliability of the documents in view of the circumstance. See Uitts v. General Motors Corporation, 411, F.Supp. 1380 (E.D., 1974), aff'd 513 F.2d 626 (3d Cir, 1975); In re Involuntary Termination of Parental Rights, 449 Pa. 543, 297 A.2d 117 (1972); Commonwealth v. McNaughton, 252 Pa.Super. 302, 381 A.2d 929 (1977). The plaintiff had failed to meet this burden.

Second, assuming, arguendo, that removal of the hearsay obstacle, the documents were properly excluded as irrelevant.

The plaintiff argues that the records are relevant as indicating that prior accidents had occurred in automobiles equipped with the Saginaw power steering unit. Proof of prior accidents or occurrences, however, has not, as a general rule, been admissible, for the reasons that such evidence is prejudicial, time

consuming, and relates to collateral matters. Uitts, supra. In those limited circumstances when such evidence is admissible, it must appear that the prior incidents occurred under the same or substantially similar circumstances. See Whitman v. Riddell, 324 Pa.Super. 177, 471 A.2d 521 (1984); City Products corp. v. Bennett Bros., Inc., 390 Pa. 398, 135 A.2d 924 (1957), disapproved on other grounds. Smith v. Bell Telephone Company of Pennsylvania, 397 Pa. 134, 153 A.2d 477 (1959). Moreover, the admission of this evidence is within the sound discretion of the trial judge. Whitman, supra; DiFrischia v. New York Central Railroad Company, 307 F.2d 473 (3d Cir, 1962).

In this case, the plaintiff did not indicate that the NHTSA reports dealt with vehicles of essentially the same type as the vehicle in question, with similar mileage, prior servicing, and maintenance

history; nor did the plaintiff indicate that the prior accidents occurred under similar circumstances or on a comparable stretch of roadway as the accident in this case. The only apparent similarity is that the steering mechanism in those cars, as with most G.M. cars at that time, was the same as that in the Ball vehicle. Consequently, there is no basis to conclude that the trial judge abused his discretion by refusing to admit the NHTSA reports into evidence.

The plaintiff also argues that the trial judge erred by excluding from evidence certain G.M. internal memoranda relating to the contamination sensitivity of the Saginaw power steering unit. These reports also contain second hand hearsay in the form of consumer complaints concerning steering malfunctions in G.M. vehicles, none of which were 1975 Pontiac Catalinas, the car driven by Ball on the night of the

accident. Thus, these documents may have been excluded, as with the NHTSA records, on the grounds that they contained inadmissible hearsay and that they were irrelevant. This is no justification to conclude that the trial judge abused his discretion in this regard. See Uitts, supra. Contrary to the contention of the plaintiff, these records of consumer complaints are not admissions by G.M.

In the sixth complaint of error, the plaintiff argues that the trial judge improperly excluded evidence of a leaking problem in the Ball vehicle resulting from the contamination of the power steering unit. In the seventh complaint, the plaintiff contends that the trial judge erred by refusing to permit the plaintiff to cross-examine on the usage of filters in other G.M. steering units. In the eighth complaint, the plaintiff argues that the court erred by permitting g.M. to show to

the jury a film demonstrating certain characteristics of the power steering system. Each complaint concerns the issue of whether the power steering system in the Ball vehicle contained a defective condition. These matters did not relate to the issue of whether the defective condition in the steering mechanism, if one was so found, would have been a substantial factor in the accident. As stated previously, the jury returned a finding that the steering system had a defective condition. Thus, any erroneous rulings are deemed harmless. See Anderson, supra.

Finally, as his ninth assignment of error, the plaintiff argues that the trial judge committed prejudicial error by allowing into evidence a diagram of the accident scene which appeared to indicate skid marks when in fact none had occurred. The marks complained of by the plaintiff were identified as yaw marks which began

"just as the car left the roadway" by the police officer that had prepared the diagram. N.T. 8/14/79, pp. 71-72. Based upon that testimony, as well as testimony by the same officer that there were no skid marks on the road, we find the plaintiff's argument on this point meritless. The testimony would indicate that the diagram, at least concerning the marks, was accurate, and that the jury had heard sufficient testimony so as to be able to correctly identify the marks. The trial judge, therefore, did not abuse his discretion in permitting the diagram to be admitted into evidence.

In light of al of the foregoing, we shall deny the plaintiff's motion for a new trial.

Supreme Court, U.S.
FILED
APR 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1583

In The

Supreme Court of the United States

October Term, 1988

FREDERICK P. SINGER, Administrator of the Estate of FREDERICK P. SINGER, JR., deceased and ROBBINS INVESTMENT CORPORATION,

Petitioners,

v.

GENERAL MOTORS CORPORATION and BRONSBERG & HUGHES PONTIAC INC. and FREDERICK BALL, ROBBINS DOOR & SASH CO. and ROBBINS INVESTMENT CORP.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

THOMAS FINARELLI
GEORGE J. LAVIN, JR. ASSOCIATES
510 Walnut Street
12th Floor, Penn Mutual Tower
Philadelphia, PA 19106
(215) 627-0303

Counsel for Respondent General Motors Corporation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether Federal Rule of Evidence 803(8)(C) requires the trial judge in a state court proceeding to admit into evidence the investigative file of the National Highway Traffic Safety Administration containing an assortment of consumer complaints asserting the existence of a defect in a power steering system similar to that alleged to have caused the motor vehicle accident giving rise to this litigation?

SUBSIDIARIES AND AFFILIATES OF GENERAL MOTORS CORPORATION

General Motors Corporation is not a subsidiary of a publicly owned corporation. All subsidiaries and affiliates of General Motors Corporation are wholly-owned except:

AeroVironment Inc. (USA)

Alambrados Automatrices, S.A. de C.V. (Mexico)

Alambrados y Circuitos Electricos, S.A. de C.V. (Mexico)

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Aralmex, S.A. de C.V. (Mexico)

Automotive Polymer Based Composites Joint Venture and Development Partnership (Co-Partnership among GM, Ford and Chrysler to coordinate basic research on plastic component materials)

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Bujias Mexicanas, S.A. de C.V. (Mexico)

Cableados de Juarez, S.A. de C.V. (Mexico)

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Hua Tung Automotive Corporation (Rep. of China)

IBC Vehicles Limited (England)

Ilmor Engineering, Ltd. (England)

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INLAN-Industria de Componentes Mecanicos, Lda. (Portugal)

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Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)

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Motor Enterprises, Inc. (USA)

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Omnibus BB Transportes, S.A. (Ecuador)

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Vestiduras Fronterizas, S.A. de C.V. (Mexico)

View Engineering (USA)

Volvo GM Heavy Truck Corporation (USA)

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

General Motors Corporation, having been served with a Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania on behalf of Frederick P. Singer, respectfully offers this brief in opposition for consideration by the Court.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court pursuant to 20 U.S.C. § 1254(1) [sic] and Rule 17 of the Rules of the Supreme Court of the United States. Respondent respectfully submits that this Court lacks jurisdiction to review the decree rendered by the Supreme Court of Pennsylvania as Petitioner does not draw in question the validity of a treaty or statute of the United States or of a statute of any State, and does not claim any title, right, privilege or immunity under the Constitution. 28 U.S.C.S. § 1257(a) (1988).

STATEMENT OF THE CASE

This action was instituted in June of 1976 in the Court of Common Pleas for Lehigh County on behalf of Frederick P. Singer and Robbins Investment Corporation. Singer sought recovery for the death of his son, Robbins for property damage to the vehicle in which young Singer was a passenger at the time of his death. Named as

defendants were General Motors Corporation and Bronsberg & Hughes Pontiac, Inc., the suppliers of the vehicle in question. General Motors Corporation subsequently joined Frederick Ball, the driver of the accident vehicle, as an additional defendant.

Singer advanced a theory of liability based upon the design of the power steering system with which the vehicle was equipped. According to that theory, the absence of an effective filter allowed contamination to reach and jam the system's working gears, rendering the steering temporarily inoperable at the precise moment the vehicle entered a curve at a speed well in excess of the posted limit. The jury accepted only the critique of the design, finding in response to special interrogatories that without a filter the power steering system was defective, but that the cause of the accident was the negligent operation of the vehicle by Frederick Ball.

Following the verdict Singer filed a motion for new trial asserting a variety of errors, among them the evidentiary ruling being challenged here. That ruling was necessitated by Singer's desire to offer into evidence documents consisting of in excess of 1,000 pages obtained from the National Highway Traffic and Safety Administration.

The agency had conducted its own investigation into consumer complaints of difficulties with the type of power steering system installed in the accident vehicle. Though presented with the opportunity to establish the elements of admissibility, counsel for Singer declined to proceed as to specific documents, attempting instead to

introduce the entire file. The court sustained an objection interposed by counsel for General Motors Corporation and excluded the documents from evidence.

That ruling was upheld by a three member panel of the Court of Common Pleas of Lehigh County, sitting *en banc*, and a three member panel of the Superior Court of Pennsylvania. The Supreme Court of Pennsylvania denied a petition seeking leave to appeal from the latter decision.

SUMMARY OF ARGUMENT

The Court lacks jurisdiction to review the judgment of the Supreme Court of Pennsylvania. Petitioner's only claimed federal question, the effect of Federal Rule of Evidence 803(8)(C), was not previously raised, and with good reason as federal rules are inapplicable to state court proceedings.

Assuming a jurisdictional basis does exist, the matter complained of is not of the character which merits the exercise of this Court's discretion. Petitioner raises an issue concerning an uncomplicated evidentiary ruling. In precluding the documents sought to be introduced, the trial judge merely applied elementary tests of trustworthiness and relevancy and found the evidence wanting in both areas.

The conclusion that the documents contained inadmissible hearsay does not conflict with this Court's recent decision in *Beech Aircraft Corporation v. Rainey*, 488 U.S.

___, 109 S.Ct. 439 (1988). Petitioner was not offering the result of a governmental investigation into the incident out of which his claim arose. He aimed instead to regale the jury with a series of unsubstantiated consumer complaints, none of which had the slightest bearing on the cause of that incident.

ARGUMENT

The thrust of Petitioner's argument is that the Pennsylvania courts which ruled on the admissibility of the NHTSA file relied on federal authority since overturned by the decision of this Court in *Beech Aircraft Corporation v. Rainey*, 488 U.S. ___, 109 S.Ct. 439 (1988). As raised by Petitioner, however, the issue is not one within the jurisdiction of this Court.

The federal provision alleged by Petitioner to be involved is Federal Rule of Evidence 803(8)(C). It is not at all clear in what fashion Rule 803(8)(C) is involved, as its scope plainly does not extend to proceedings in state courts. FED. R. EVID. 101. Consequently Petitioner's attempt to establish jurisdiction on that basis is ineffectual.

Other than Rule 803(8)(C) Petitioner has identified no treaty, no federal or state statute, and no right arising out of the Constitution as being connected in any way to the outcome of his wrongful death claim. Accordingly Petitioner has failed to meet the statutory jurisdictional criteria established for this Court. 28 U.S.C.S. § 1257(a) (1988).

Jurisdictional difficulties aside, the Petition fails to set forth an issue worthy of this Court's review. The ruling about which Petitioner complains was merely an exercise of sound judicial discretion applied to an ordinary evidentiary problem. Petitioner's assertions to the contrary notwithstanding, the state courts did not rely on now invalid federal authority in holding the proffered evidence inadmissible. The opinions make clear that elementary principles regarding hearsay and relevancy provided the basis for excluding the documents, and ample authority from both state and federal courts is cited for support.

Nor has Petitioner demonstrated a conflict with *Beech Aircraft*. That decision concerned a governmental investigation into the very incident which gave rise to the litigation, not so here. The file offered *en masse* at this trial described a number of unrelated consumer complaints. Petitioner wished to place only those complaints before the jury, for his cause would not have been aided by disclosing the opinion of the government investigators that there was no design defect in the power steering system. Leaving the decision of the Supreme Court of Pennsylvania undisturbed therefore will not violate the rationale underlying *Beech Aircraft*.

CONCLUSION

For the above reasons the Petition for a Writ of Certiorari should not be granted.

Respectfully submitted,

THOMAS FINARELLI
GEORGE J. LAVIN, JR. ASSOCIATES
510 Walnut Street, 12th Floor
Penn Mutual Tower
Philadelphia, PA 19106
(215) 627-0303

Counsel for Respondent
General Motors Corporation

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